

STATE OF MICHIGAN  
COURT OF APPEALS

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TBCI PC,

Plaintiff-Appellant,

v

STATE FARM MUTUAL AUTOMOBILE  
INSURANCE COMPANY,

Defendant-Appellee.

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UNPUBLISHED  
September 25, 2008

No. 277260  
Macomb Circuit Court  
LC No. 2005-001132-NI

Before: Schuette, P.J., and Zahra and Owens, JJ.

PER CURIAM.

This first-party no-fault dispute arose after defendant State Farm refused to reimburse plaintiff TBCI<sup>1</sup> for treatment of Fatbardha Shaholla (Shaholla) in regard to an October 1, 2003 car accident. Shaholla claimed to have suffered a mild traumatic brain injury from the accident. Following a bench trial the trial court found, in part, that Shaholli had not suffered a brain injury in the October 2003 car accident. TBCI appeals as of right from an opinion and order of no cause. We affirm.

I. Facts and Proceedings

On October 1, 2003, at 11:57 a.m., an automobile struck the car Shaholla was driving in driver's side door. An ambulance arrived at 12:08 p.m., the damaged door was removed, and Shaholla was extricated from the car. Emergency medical technicians (EMT) responding to the accident noted Shaholla's "level of consciousness" as "alert" and determined a Glasgow Coma Scale of 15 (out of 15), which is normal.<sup>2</sup> The EMT report also noted that Shaholla was "conscious throughout." The police report of the accident listed "C," which indicates possible injury or momentary loss of consciousness.

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<sup>1</sup> "TBCI" stands for Traumatic Brain Catastrophic Injury.

<sup>2</sup> An EMT determines the Glasgow Coma Scale by measuring whether an injured person's eyes are open and whether they are able to respond to a command, such as indicating the date.

An ambulance took Shaholla to the emergency room at Mt. Clemens General Hospital. Brian K. Liska, D.O. examined Shaholla and found as a “final diagnosis: “(1) motor vehicle collision; (2) strain; (3) closed-head injury; and (4) low-back pain.” He also indicated that Shaholla reported, through an interpreter,<sup>3</sup> occipital pain (back of head) and minor sacral pain (back pain). Dr. Liska also indicated that Shaholla “denies any loss of consciousness,” “denies any change in vision, increased nausea or increased somnolence.” Dr. Liska prescribed Motrin 600 for pain, and provided head injury instructions to the family.

On October 3, 2003, Shaholli sought treatment from chiropractor, Dr. Macon. His notes taken on that day reflect that Mrs. Shaholli claimed to have been dazed and confused after the accident but was not unconscious. Dr. Macon eventually referred Shaholli to Dr. Eric Backos, a physiatrist. On November 25, 2003, she visited Dr. Backos and received a rehabilitation evaluation. The evaluation indicates that Shaholla complained of “[h]eadaches, sleeping a lot during the day, difficulty sleeping at nighttime, decreased memory . . . [and] low back pain.”

Dr. Backos’ report states that Shaholli indicated to him that she “recalled the collision,” but further reports that “[t]he next thing she knows the police were present and she was being helped out of the car. She does not recall how long it took and she does not recall how long she had loss of consciousness.” Dr. Backos reviewed an MRI scan that had revealed a central disc herniation in the L5-S1 region. Dr. Backos’ diagnostic impressions included: (1) “traumatic brain injury/post traumatic stress;” (2) “cervical strain;” (3) “L5 disc herniation;” (4) “anxiety;” and (5) “right hip pain.” Dr. Backos recommendations included: (1) neuropsychological testing to evaluate for traumatic brain injury versus post-traumatic stress; (2) home assistance four hours per day, seven days a week; (3) Klonopin for sleep, Soma as a muscle relaxant, and Darvocet for pain control; (4) no driving; (5) chiropractic care for five to eight weeks; (6) MRI of the brain; and (7) EMG and nerve conduction studies for evaluation of low back disc herniation.

State Farm claims supervisor, Jodie McCadden, testified that State Farm began investigating Shaholli’s claim around February 12, 2004, after it was discovered that Shaholli failed to disclose a prior back injury claimed under worker’s compensation. State Farm’s activity log indicates that during March and April 2004 Shaholli was under surveillance in regard to her claim. The surveillance tapes show Shaholli engaging in activities that she previously reported she could not do after the accident. In late May, the activity log indicates that State Farm began arranging for independent medical reviews of Shaholli’s alleged maladies.

On March 23, 2004, Shaholli returned Dr. Backos for a follow up visit, and again complained of headaches with severe pain radiating from the back of her head to the top of her head. She also indicated continuing memory problems and low back pain. Dr. Backos again asked about “the loss of consciousness.” She reported that “she really was not sure. She does recall the police being there and she believes there was a period of time between the accident and time the police were there that she may have lost consciousness, but she was not sure.” Dr. Backos recommended Shaholli to Dr. Richard Weiss for neuropsychological testing.

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<sup>3</sup> The record reflects that Shaholla primarily speaks Albanian and relied on an interpreter, typically her daughter-in-law, Gina.

On May 1, 2004, Dr. Richard Weiss, PhD in educational psychology, conducted a neuropsychological examination of Shaholli with the help of an interpreter. Weiss completed the report on May 10, 2004, and reached, in part, the following “diagnostic impressions”

Posttraumatic Brain Syndrome, Secondary to Closed Head Injury Explanation: The examinee is presenting with a constellation of symptoms consistent with closed head injury, including memory deficits and sensory-motor deficits. This condition is a consequence of the motor vehicle accident that occurred October of 2003. A re-examination within a period of six to twelve months will allow for a more definitive diagnosis to be provided.

Organic Personality Syndrome, Secondary to Closed Head Injury: The examinee is presenting evidence of changes in personality and behavior resulting from the accident. This should be the subject of further investigation during the treatment process.

The report lists the following as factors Dr. Weiss relied upon in reaching the above conclusions:

- a. Ms. Shaholli sustained an injury in which she experienced an altered state of consciousness;
- b. Three of four sensorimotor scales on the Luria-Nebraska Battery fell within the impaired range;
- c. Spatial span was severely impaired;
- d. The examinee experienced difficulty with memory tasks on the Luria Nebraska Battery;
- e. The Emergency Room physician provided a diagnosis of closed head injury;
- f. The examinee reports changes in her cognitive status subsequent to the motor vehicle accident; and
- g. Examination results are consistent with appropriate effort.

However, Dr. Weiss admitted that “Shaholli’s neurological profile is somewhat difficult to interpret due to the relatively uniform depression of a wide range of abilities.” Further, “Shaholli’s performance I.Q. of 65 falls within the extremely low range of intelligence at the first percentile.”

Dr. Backos apparently referred Shaholli to Dr. Thomas Park, M.D., founder and owner of TBCI, and, on June 15, 2004, he examined Shaholli. Dr. Park is a board certified psychiatrist, and holds several other certifications, including addiction medicine, pain medication, forensic examination and clinical psychopharmacology. Dr. Park’s report indicated that he reviewed Weiss’ neurological test, Dr. Backos’ November 23, 2003 evaluation report and the emergency room report. Dr. Park’s report also indicates that Shaholli reported “she was able to recall the collision and how the police were present and helped her out of the car, but she does not recall

how long it took and how long she had loss of consciousness or anything else about the accident . . .” She also “does not recall whether or not she hit her head on anything at the time of the accident.” Shaholli reported the numerous following post-accident symptoms: anxiety in cars, excessive worrying, nightmares, sleep disturbances, reduced appetite, racing thoughts, mood swings, disorientation, memory loss, decreased libido, blurred vision, sometimes numb leg, rare muscle spasms, poor balance, dizzy spells, daily severe headaches, and change in taste and smell sensations, and her daughter-in-law, expressed that Shaholli appears to have depression, reduced energy level, fatigue, slowed motor functioning and isolation from family interaction. Dr. Park’s report also indicates that since the accident, Shaholli lost the ability to read and speak basic English.

Dr. Park’s diagnostic impression was: “Cognitive Disorder secondary to closed head injury . . . and Major Depression secondary to automobile accident;” “Major Depression Single Episode not Psychotic secondary to closed head injury from automobile accident;” “Chronic Pain Syndrome secondary to closed head injury,” Sleep Disorder secondary to closed head injury;” and “Sustained closed Head Injury from an automobile accident on October 1, 2003 . . . .”

Dr. Park summarized that Shaholli,

“was involved in a motor vehicle accident on October 1, 2003, . . . apparently sustained trauma to her head, neck and back. She apparently has been demonstrating severe depression along with cognitive impairment secondary to closed head injury, chronic pain syndrome, and sleep disorder from this particular automobile accident for which she requires intensive rehabilitation treatment along with medication management.

Shaholli began treatment at TBCI in June 2004. The record reflects that TBCI’s head injury program includes a psychiatrist, (Dr. Park), two psychologists, an occupational therapist, a physical therapist, a physiologist, a language and speech pathologist, a professional counselor, a cognitive therapist and a certified occupational therapy assistant. Shaholli attended TBCI three days per week, six hours per day. A statement of services for Shaholli indicates that TBCI is owed \$62,747.00.<sup>4</sup> Shaholli was discharged from TCBI in January 2006.

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<sup>4</sup> TBCI’s brief on appeal cites testimony in which “Dr. Park described a typical day of treatment for Mrs. Shaholli at TBCI as follows:”

I’m – I’m the one who ran group called “Goals and Solutions and Concerns,” in which I’m going to bring one or two therapists for them to write my therapy sessions, okay, and then I have them type in the computer, okay. And that is -- that group therapy is more educational and cognitive and dynamics as well as, what, supportive and information sharing and then supportive nature, like that.

And -- and then ten minutes break and 10:40 to 11:30 we call second hour therapy session. This is either speech language therapist or occupational therapist or

(continued...)

On July 13, 2004, Shaholli visited Dr. Backos for another follow up. By this time, Dr. Backos had read Dr. Weiss' report. Dr. Backos continued to refer Shaholli to Dr. Park, "to evaluate depression and traumatic brain injury."

On November 20, 2004, Dr. Weiss conducted a re-examination of Shaholli. She continued to report, "hypersensitivity to light," "difficulty with depth perception," occasional tinnitus (ringing in the ears) as well as hypersensitivity to noise," "numbness and tingling sensations," but "reports no changes in her senses of smell or taste." Shaholli reported "difficulty with balance, muscle weakness, dizziness, and fatigue," but she is no longer experiencing a loss of speed of movement." Shaholli reported "tremors as well as spasms in her neck," and "difficulty with light pulling, pushing, reaching, sitting, standing, and bending." Shaholli "continu[es] to experience headaches" that "occur approximately three days a week and typically persist for about six hours." She also reported, "difficulty with word retrieval (especially in English) as well as difficulty attending to conversation."

The second test was essentially the same as the first test, again using an interpreter. Dr. Weiss noted that Shaholli had slightly improved scores on some tests and made significant improvement on at least two tests. Given the improvement on test scores and his clinical observation of Shaholli, Dr. Weiss concluded:

After the second evaluation, looking at the pattern of test scores, it was my conclusion that Ms. Shaholli did indeed sustain a closed head injury as a result of the October 2003 accident. There was also evidence she was continuing to present with adjustment related symptoms.

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(...continued)

computer integrated cognitive therapy, okay. So one of those three assigned to the second group, okay.

And then 1 1:30 to 12:10 we have lunch break, and then staff and all patients eat together at the dining room. And then where some form of informal, like, therapy going on there, okay. This is very informative and then socialization stuff, things like that.

And then so the very first month or two we have not seen Ms. Shaholli eat lunch at all, okay, because she has loss of appetite. So we provided a, what, Ensure can at all time, okay.

And then third hour will come from 12:10 to 1:00 o'clock. That is either, what, occupational therapy or psychologists, you know, group therapy or nursing therapy or speech therapy or cognitive therapy or cognitive computer therapy.

And then 2:00 o'clock to -- 1:00 o'clock to 1:50 is fourth hour. And one of those therapies they're assigned there, too. And then 2: 10 to 3:00 o'clock fifth hour therapy is carried on, okay.

On October 15, 2004, Harvey Ager, M.D., a board certified psychiatrist retained by State Farm to conduct a medical evaluation and review of Shaholli, completed his evaluation. State Farm sent a copy of the evaluation to Shaholli's attorney. In a letter dated December 6, 2004, State Farm's claims agent sent a letter to Shaholli's attorney indicating that "based on material in our file as well as Dr. Ager's report, I am not able to consider the further attendant care claims submitted to us in July on June 18, 2004, prescriptions incurred on June 18, 2004, Dr Weiss' expense for neuropsychological testing, and for all the treatment incurred at TBCI Head Trauma Network, or with Dr. Park." The letter also stated that "[a]s I advised you in numerous correspondence, I questioned the need for attendant care and treatment for a closed-head injury or psychological complaints resulting as a result of the above-captioned automobile accident."

On March 21, 2005, TBCI filed the complaint against State Farm seeking payment on Shaholli's account. No motions for summary disposition were filed and the trial court conducted a nine-day bench trial between November 29, 2006 and January 4, 2007. At trial, TBCI presented evidence through testimony of TBCI's employees and treating physicians, Dr. Park, Dr. Weiss and Dr. Backos, that Shaholli was properly diagnosed with a mild closed head injury and that her condition improved through TBCI treatment. State Farm largely relied on deposition and trial testimony in regard to medical evaluations and reviews of Shaholli's alleged maladies that were performed by Dr. Ager, Dr. Bradley Axelrod PhD, board certified in neurophysiology and assessment psychology, Robin Hanks PhD, a clinical psychologist with a subspecialty in neuropsychological and biopsychology, and Leonard Sahn M.D., board certified neurologist and clinical neurophysiologist. After conducting their reviews, all the above experts concluded that Shaholli should not have been diagnosed with a closed head injury. The records provided to the experts also included TBCI's progress notes, of Shaholli's treatment. Based on their review of these medical records, several experts criticized Shaholli's treatment at TBCI as excessive, improper and otherwise ineffective. The trial court ruled in State Farm's favor, finding that Shaholli did not suffer and closed head injury and that TBCI's treatment of Shaholli was not reasonably necessary and lacked scientific validity. This appeal ensued.

## II. Standard of Review

"Following a bench trial, we review for clear error the trial court's factual findings and review de novo its conclusions of law." *Ligon v City of Detroit*, 276 Mich App 120, 124; 739 NW2d 900 (2007), citing *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n*, 264 Mich App 523, 531, 695 NW2d 508 (2004). Clear error exists when some evidence supports a finding, but a review of the entire record leaves the reviewing court with the definite and firm conviction that a mistake has been made. *Sinicropi v Mazurekm*, \_\_\_ Mich \_\_\_; \_\_\_ NW2d \_\_\_ (2008). Statutory interpretation is a question of law that is considered de novo on appeal. *Detroit v Ambassador Bridge Co*, 481 Mich 29, 35; 748 NW2d 221 (2008).

## III. Analysis

TBCI advances several arguments to support the general claim that the trial court committed reversible error in finding Shaholli did not suffer a closed head injury.

As a preliminary matter, TBCI argues that under *Churchman v Rickerson*, 240 Mich App 223, 611 NW2d 333 (2000), "only a licensed allopathic or osteopathic physician, who regularly diagnoses or treats head injuries, could provide testimony sufficient to create a jury fact question

on whether a closed head injury may have resulted in a serious neurological injury.” TBCI admits that Churchman involved a claim under MCL 500.3135(2)(a)(ii), which provides, in part, that:

. . . However, for a closed-head injury, a question of fact for the jury is created if a licensed allopathic or osteopathic physician who regularly diagnoses or treats closed-head injuries testifies under oath that there may be a serious neurological injury.

The trial court and State Farm are correct that the instant case is not third-party action under MCL 500.3135, but a first party action under MCL 500.3107(1) and (1)(a), which relate to “personal protection insurance benefits . . . payable for . . . “[a]llowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person’s care, recovery, or rehabilitation.” MCL 500.3107(1) and (1)(a). MCL 500.3107 does not contain a special provision for closed head injuries. Thus we conclude that *Churchman* is not applicable to the present case.

More generally, TBCI argues the trial court’s factual finding that Shaholli did not suffer a closed head injury is clearly erroneous, and unsupported by record evidence. Specifically, TBCI argues that the trial court committed clear error because it afforded no deference to Shaholli’s expert witnesses, many of whom were her treating physicians, and instead relied on State Farm’s expert witnesses who never treated Shaholli and, in some instances, never even examined her. We again find TBCI’s position to be without merit.

“To be reimbursed for an “allowable expense” under MCL 500.3107(1)(a), a plaintiff bears the burden of proving that (1) the charge for the service was reasonable, (2) the expense was reasonably necessary, and (3) the expense was incurred.” *Spect Imaging, Inc v Allstate Ins Co*, 246 Mich App 568, 633 NW2d 461 (2001). *Spect* also noted that our Supreme Court, in *Nasser v Auto Club Ins Ass’n*, 435 Mich 33, 52, n 7, 457 NW2d 637 (1990), observed that § 3107 is a provision of liability.

[A]n insurer is not *liable* for any medical expense to the extent that it is not a reasonable charge for a particular product or service, or if the product or service itself is not reasonably necessary. The plain and unambiguous language of § 3107 makes both reasonableness and necessity explicit and necessary elements of a claimant’s recovery, and thus renders their absence a defense to the insurer’s liability. [*Nasser, supra* at 49 (emphasis in original).]

Under the no-fault act, an insurance carrier “need pay no more than a reasonable charge and . . . a health care provider can charge no more than that.” *McGill v Automobile Ass’n of Michigan*, 207 Mich App 402, 408; 526 NW2d 12 (1994). Further, “insurance companies are not required to accept health-care providers’ unilateral decisions about what constitutes reasonable medical expenses, because to do so would undermine the Legislature’s purpose in enacting § 3107.” *Spect, supra* at 577, citing *McGill, supra*.

Here, the trial court, sitting as fact finder, rejected the testimony of Shaholli’s many health care providers and, instead, accepted the testimony of State Farm’s expert witnesses. The trial court gave ample reasons for rejecting plaintiff’s offered proofs. The trial court held:

In the case at hand, the Court is satisfied that Ms. Shaholli did not suffer a closed head injury. The Court finds the testimony of Dr.'s Sahn, Axelrod, and Hanks to be credible, and the testimony of Dr. Park to be lacking scientific credibility. Dr. Park's diagnosis is based in part upon a faulty incomplete diagnosis of closed head injury at the emergency room and by Dr. Weiss. Both of these diagnoses are suspect, and therefore Dr. Park and Dr. Backos' reliance upon them was improper. The Court finds it significant that all of Ms. Shaholli's treating physicians find a closed head injury based upon a clearly questionable history of unconsciousness by Ms. Shaholli. The Court also finds that Dr. Weiss's finding that Ms. Shaholli had an IQ of 65 is suspect because of language difficulties, or a deliberate attempt to overstate her problems. In addition, the Court finds that Dr. Weiss determined in May that he did not feel he had results sufficient to provide a diagnosis of head injury with reasonable clinical certainty. Consequently, Dr. Weiss could not diagnose even a mild traumatic brain injury, and therefore Dr. Park and Dr. Backos' reliance upon the apparent diagnosis of closed head injury was improper.

We cannot disturb the trial court's conclusion that Dr. Weiss' diagnosis of closed head injury was erroneous. The only objective basis on which Dr. Weiss changed his opinion from an impression of a closed head injury to a diagnosis of a closed head injury were the test results from the second evaluation. Beyond the questionable administration of the test to Shaholli, who had extremely limited English skills and relied on an unapproved translator, Dr. Weiss noted the test results indicated a high number of atypical responses, possibly reflective of symptom exaggeration. Dr. Weiss also admitted that "the neuropsychological profile was difficult to interpret due to the relatively uniformed depression across a wide range of abilities."

Further, there was additional evidence presented indicating that Shaholli made a poor effort in testing. Dr. Hanks noted that Shaholli's performance on both the Digital Span tests failed to meet the threshold for "poor effort, to intentionally present one's self as – as doing more poorly on that measure." Also Dr. Ager "thought the tests results weren't necessarily valid. For one thing, her IQ was supposedly only 65," "which places her in the borderline mentally retarded range, which I didn't believe was consistent with what I saw when I evaluated her." For instance, Dr. Ager noted that Shaholli appeared fluent in Albanian. Dr. Sahn testified in regard to Dr. Weiss test results, that,

[w]ell, even his own testing showed gross inconsistencies and evidence of such poor effort and such low scores that you have to consider malingering. But he seems to bend over backwards to disregard those possibilities. And, you know, I just don't get it, how someone could score that low and blame it on an accident, when there really is no documentation of head trauma. It's just, it's so disproportionate, so disconnected. The scores are so low that people with severe brain injuries don't have them. I mean, and yet she's scoring that low.

Thus, the trial court legitimately questioned the legitimacy the test scores upon which Dr. Weiss relied to conclude that Shaholli suffered a closed head injury.

Likewise, there exists ample evidence to support the trial court's rejection of Dr. Backos' diagnosis of a closed head injury. Dr. Backos testified that:



It was my opinion that she did [suffer a closed head injury]. I did review on June 3, 2004, Dr. Weiss' neuropsych testing. Base on the history that Shaholli, through her daughter, gave me and the complaints she had, as well of the history of the accident, that was a suspicion and that was confirmed to me in the neuropsych testing that there was a likely – likely possibility that we were dealing with a head injury. So that would have been my opinion.

The trial court criticized Dr. Backos' diagnosis for relying on the "diagnosis of closed head injury at the emergency room and by Dr. Weiss. Both of these diagnoses are suspect, . . . Dr. Backos' reliance upon them was improper."

There is no real dispute with the trial court's finding "that Dr. Weiss determined in May [2004] that he did not feel he had results sufficient to provide a diagnosis of head injury with reasonable clinical certainty." Thus, we cannot disagree with the trial court's conclusion that, since "Dr. Weiss could not diagnose even a mild traumatic brain injury, . . . Dr. Backos' reliance upon the apparent diagnosis of closed head injury was improper." Further, Dr. Backos expressly denied that he diagnosed Shaholli with a closed head injury. The following transpired at trial:

*Q.* So if brother counsel suggests that you actually made a diagnosis of traumatic brain injury in your report of November the 25<sup>th</sup>, 2003, you did not; you merely gave that impression, correct?

*A.* that's correct.

Dr. Backos had earlier indicated that the term "impression," medically means "things you're going to examine and later try and determine." On this record, we cannot conclude that the trial court erred when it discounted Dr. Backos' alleged diagnosis of closed head injury.

Dr. Narayan Verma, M.D., is a neurologist board certified in neurophysiology who diagnosed Shaholli with narcolepsy allegedly caused by the closed head injury. The trial court was under no obligation to give any weight to Dr. Verma's testimony, as her diagnosis was one of narcolepsy, not closed head injury. In any event, Dr. Verma's testimony that the narcolepsy was caused by a closed head injury was effectively impeached. Dr. Verma admitted that "narcolepsy can come from a number of sources beside trauma." Thus, the trial court need not accept TBCI's attempt to imply the existence of closed head injury from the existence of narcolepsy. Further, Dr. Verma initially indicated that literature exists that "relate[s] trivial head trauma to narcolepsy," but later testified, that:

*Q.* I believe you said to Counsel that it was well-known in the literature that even a small trauma causes narcolepsy?

*A.* I did not say that. I did not say that. Ask your court reporter to tell you what I said.

*Q.* You said very trivial.

*A.* No, I did not say that.

Q. You did not?

A. I said the literature is divided at this point.

Q. Can you tell me a single article or a thing I could look at that says very trivial, and that it exactly what you said, head injury can cause narcolepsy?

A. You will not twist what I said. You'll have to ask your court reporter to tell you exactly what I said?

Q. Then let's do it this way, because the Judge will have a chance to see and he will hear the phrase very trivial.

A. If you take it out. I said the literature is not clear.

Q. So there is no literature --

A. I said the literature is not clear. Let me finish. The literature is not clear. Some people think it is related to the severity of the injury and other who think there's no connection between the severity of the injury and the severity of the sleep disorder, that's what I said.

Thus, even supposing the existence of a mild closed head injury, the trial court could readily conclude that Dr. Verma's testimony did not support the conclusion that Shaholli's alleged brain injury caused narcolepsy. The trial court did not err in discounting any inference from Dr. Verma's testimony that Shaholli suffered a closed head injury.

The trial court discounted Dr. Park's testimony that Shaholli had suffered a closed head injury in the October 2003 car accident because he relied on Dr. Weiss' and Dr. Backos' diagnosis. However, at the time Dr. Park made his diagnosis, neither Dr. Weiss nor Dr. Backos had yet diagnosed Shaholli with a closed head injury. In summary, the trial court did not clearly err in discounting testimony from Dr. Park, or any of TBCI's other expert witnesses to conclude that TBCI failed to prove that Shaholli suffered a closed head injury in the October 2003 auto accident.

Further, ample evidence was presented at trial that Shaholli did not suffer a closed head injury. Dr. Park's testimony stands in contrast to the testimony of Dr. Sahn, who concluded that:

I didn't think there was anything wrong with her. I think that she had what is probably a factitious disorder. I think that she may well have been faking. At the very least there was no neurologic disease. And I just didn't -- just thought she was being overtreated and was being told that she had all kinds of things that she didn't really have, that there was no basis to say that she had those things.

He further explained that:

I mean someone complaining of multiple symptoms that may seem to resemble some disorder but are really just made up. Just, they're not, you know, they're not real. Malingering means that they're doing it consciously with an idea

towards some kind of gain, and I suspect that, but I can't -- that has to do with her state of mind, so I can't say for sure that she is, but it certainly would raise that possibility.

In regard to TBCI's experts' diagnosis, Dr. Sahn testified that:

There was a willingness to accept all these complaints, which really had a huge nonorganic flavor to them. There were just so many complaints, and yet there was no objective indicator that she had an injury that could cause all these complaints. And yet, they just seemed to accept this. They just said, oh, okay, and they just went ahead and they, you know, gave her medication, made diagnoses about sleep disorders and things that were secondary to a brain injury without having, in my estimation, one scintilla of evidence that she had a brain injury. Other than a bunch of subjective complaints that were easily -- that could just as easily been made up or hysterical or imaginary or suggested or, you know, who knows what.

Dr. Axelrod also seriously questioned the severity of Shaholli's maladies. He testified that:

It would be atypical for an individual who has no loss of consciousness and presents with a Glasgow Coma Scale that's within normal limits at the time of an accident to be as profoundly impaired as she was at the time Dr. Weiss saw her seven months after the motor vehicle incident. Her best scores fell in the low average range on some tests of nonverbal processing and yet in other tests of nonverbal processing they fell significantly lower, in the moderately impaired range.

Dr. Axelrod further indicated:

Again, we see someone at the scene who has no loss of consciousness, who denies a loss of consciousness, who is seemingly oriented, who's responsive to verbal commands now performing at levels that are profoundly impaired, again being in the impaired range on all eight nonverbal tests, on the Luria-Nebraska neuropsychological test battery according to Dr. Weiss. And in addition to these severe and significant cognitive symptoms she also presents with what Dr. Weiss noted to be with severe anxiety, depression and health concerns.

Although the trial court did not indicate that that it relied on Dr. Ager's testimony, the testimony nonetheless provides further evidence that Shaholli did not suffer a closed head injury. Dr. Ager indicated that:

She told me that subsequent to the accident she had developed some rather strange symptoms, I thought. For example, she could not remember her date of birth, her Social Security number, her children's dates of birth, which would indicate that she's lost long-term memory function.

Dr. Ager seriously questioned these reported symptoms:

[as] virtually impossible with a mild traumatic brain injury. Even assuming she had a brain injury, which I doubt, you would never expect loss of long-term memory, because with mild traumatic brain injuries you usually see initial loss of short-term memory function. As time goes on that improves. But you'd only see loss of long-term memory with massive brain injuries or, more often, with a degenerative of type of brain process such as Alzheimer's disease or chronic alcoholism. You would never expect a person to forget their date of birth and the dates of birth of their children. Another unusual symptom was that supposedly since coming to this country eight years ago she had gone to school and learned English for four years. She had a fairly good command of the English language, but that subsequent to this alleged traumatic brain injury she forgot how to speak English.

Dr. Ager further indicated that, "[a]nd you would expect, too, if she lost her ability to speak language, she would lose her ability to speak Albanian as well as English. I mean, they're both controlled in the same speech center of your brain."

In addition, surveillance tapes taken by State Farm depict Shaholli engaged in activities that she claimed she could not do. Accordingly, the trial court did not clearly err in finding that Shaholli did not suffer a closed head injury as a result of the October 2003 accident.

#### IV. Conclusion

The trial court did not clearly err when it found that Shaholli did not suffer a closed head injury as a result of the October 1, 2003 car accident. Therefore, we need not reach the question whether TBCI's treatment of Shaholli was not "reasonably necessary . . . for [her] care, recovery, or rehabilitation." Likewise, we do not address plaintiff's claim that the trial court erred in its finding that TBCI's treatment of plaintiff lacked scientific credibility.

Affirmed.

/s/ Bill Schuette

/s/ Brian K. Zahra

/s/ Donald S. Owens